

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs May 13, 2008

STATE OF TENNESSEE v. MARILYN DENISE AVINGER

Direct Appeal from the Criminal Court for Davidson County
No. 2005-B-1239 Steve Dozier, Judge

No. M2007-00706-CCA-R3-CD - Filed September 4, 2008

The defendant, Marilyn Denise Avinger, was convicted of one count of attempted second degree murder. She was sentenced to nine years, with all but thirty days suspended. The defendant argues on appeal that the trial court erred by admitting prejudicial photographic evidence, and she also argues that the evidence was not sufficient to support her conviction. Following our review of the parties' briefs, the record, and the applicable law, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

J.C. McLIN, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and D. KELLY THOMAS, JR., JJ., joined.

Joy S. Kimbrough, (on appeal and at trial) and Ron Munkeboe, (at trial) Nashville, Tennessee, for the appellant, Marilyn Denise Avinger.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Pamela Anderson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. BACKGROUND

The victim, Sadie Mae Brooks, testified that she lived with the defendant's mother at her home in Nashville when she was attacked by the defendant. The victim stated that the defendant did not live in the home. The victim testified that on the day of the attack, the defendant entered her room about fifteen minutes after the victim returned home from work. The defendant accused the victim of cheating on her brother, Charles Avinger. The defendant confronted the victim about staying in a hotel room with the defendant's boyfriend. According to the victim, the defendant then jumped on top of her and began hitting and scratching her. The victim scratched the defendant and pulled her hair to get the defendant to stop. The defendant cried out for her mother at one point before ending her initial attack.

The victim testified that after the defendant ceased her initial attack, she left the room and went into the kitchen. The victim walked to the doorway of her bedroom and saw the defendant grab a knife from the kitchen counter. According to the victim, the defendant charged at her with the knife yelling, "Bitch, I'm going to kill you." The victim attempted to shut the door but the defendant blocked the door with her foot. The defendant reached around the door with the knife and began stabbing repeatedly at the victim. The defendant succeeded in stabbing the victim on the left hand and wrist. The victim recalled that after the defendant stabbed her hand, she bled profusely and believed that she was going to pass out. According to the victim, the defendant also succeeded in stabbing her in the shoulders, once above the right breast, and once on the left arm.

The victim testified that she was finally able to get the door closed and locked. She dialed 9-1-1 on the telephone in the bedroom. The cord for the phone went to a jack on the other side of the door. The defendant unplugged the phone before the victim could complete her call. The victim stated that she waited in the room until the police and paramedics arrived and transported her to the hospital. She testified that months after the attack, she still had scars from the stabbing. She also suffered a permanent injury to her finger which prevented her from moving it.

On cross-examination, the victim testified that she had lived at the defendant's mother's home for about six to seven months prior to the attack and had been dating the defendant's brother for about nine months. She stated that prior to living with the defendant's mother, she had been homeless. After getting a job, she was able to pay the defendant's mother rent and pay for food. The victim stated that she had been the defendant's friend until the defendant got a new boyfriend. She stated that after the defendant attacked her, she moved in with a family member before moving back to her hometown.

On cross-examination, the victim testified that she was sitting on her bed and working on paying her bills when the defendant confronted her. According to the victim, the defendant jumped on her as she sat on the bed. The victim stated that the defendant's mother and the defendant's brother were in the living room adjacent to the victim's bedroom. She stated that neither the defendant's mother nor the defendant's brother came into the room during the attack.

The victim further testified that after the incident, the defendant's brother placed the knife the defendant used in the kitchen sink. According to the victim, the defendant's brother did not call 9-1-1 for her. She stated that from the time she dialed 9-1-1, it was approximately ten minutes before police and paramedics arrived at the house. She stated that she was taken to the emergency room and given stitches. The victim stated that after she left the house, the defendant's brother called her and asked her to drop the charges against his sister. The victim refused his request.

Charles Avinger testified that he was the defendant's brother and was dating the victim at the time. He stated that as he was returning to his mother's house, he encountered his sister, the defendant, leaving the house to go to work. The defendant informed him that the victim was having a relationship with her boyfriend. Mr. Avinger entered the house and saw the victim who was

bleeding and had a towel wrapped around her arm. His mother yelled at him to call the police. According to Mr. Avinger, he dialed 9-1-1 before asking the victim what happened.

Mr. Avinger testified that he never saw the fight between the victim and the defendant. He stated that he never touched the knife used in the attack. Mr. Avinger admitted that he and his mother had consumed about four or five beers during the course of the day but maintained that he was not drunk. After paramedics arrived and took the victim to the hospital, he remained at the house with his mother. Mr. Avinger noted that there was quite a bit of blood on the door to the victim's bedroom, as well as on the rug and on clothes left on the bedroom floor.

On cross-examination, Mr. Avinger testified that when he encountered his sister outside the house, she was walking, not running. He noticed that she had scratches and her shirt was torn and had blood on it. Mr. Avinger identified a photograph of the maroon rug and the carpet underneath it from the floor of the bedroom he shared with the victim. He stated that the maroon rug and the carpet had brown stains on them prior to the attack. However, he admitted that there was blood all over the rug and the carpet after the attack. He acknowledged that the rug and carpet did not have any blood on them when he left the house earlier that day.

The defendant testified that she went to the house shared by the victim, her brother and her mother after work to check on her mother. When she arrived at the house, the first person she saw was the victim. She told the victim that she knew that her boyfriend and the victim had engaged in a sexual relationship behind her back. She informed the victim that she had a bank statement proving that her boyfriend and the victim had been together in a hotel. The defendant stated that she was upset because she had allowed the victim access to her house, and she believed that the victim had been sleeping with her boyfriend while the defendant was at work.

The defendant testified that she told the victim that she was going to tell her brother about the victim's relationship with the defendant's boyfriend. According to the defendant, the victim jumped up from where she was sitting on the bed and the two began to fight. The two scratched and pulled each other's hair as they fell onto the bed and rolled around, fighting. According to the defendant "from somewhere - I don't know where - a knife come up." The two women struggled over the knife. At one point, the knife penetrated the victim's hand. The defendant stated that she did not have a knife that day when she went over to the house. She denied ever going to the kitchen to retrieve a knife.

The defendant testified that the victim tore a large clump of hair from her head and was pulling on her hair when the defendant called out to her mother to tell the victim to release her. According to the defendant, her mother came in and told the two women to quit fighting. The defendant heard her mother run out of the room and yell for her brother. The defendant identified a photograph taken of her after the incident and pointed out injuries and scars she received as a result of her struggle with the victim.

On cross-examination, the defendant testified that the knife that was used in the fight was no bigger than a steak knife or a paring knife. She stated that as she left the house and encountered her brother, she told him “he was right.” According to the defendant, this comment was related to a message Mr. Avinger left the defendant on her answering machine about his suspicion that the defendant’s boyfriend and the victim were having a relationship. The defendant admitted that when she came to her mother’s house, she brought her boyfriend’s bank statement with her in order to confront the victim.

The defendant further testified that she did not know how the victim came to be stabbed in each shoulder during the struggle on the bed. The defendant admitted that she only called out to her mother to get the victim to stop pulling her hair. She also admitted that she did not call out to her mother during the time the victim had the knife, or at any point during the fight when the victim was stabbed. The defendant stated that all of the cutting occurred while the two women were “tussling” on the bed. The defendant admitted that she left her mother alone in the house with the victim and the knife when she left. She also admitted that she did not warn her brother about the victim before he entered the house.

The jury found the defendant guilty of attempted second-degree murder. The defendant was sentenced to nine years with all but thirty days suspended. The defendant was ordered to serve the remainder of her sentence on probation. The trial court denied the defendant’s motion for new trial and she filed her notice of appeal.

II. ANALYSIS

A. Admission of the Photograph

The defendant argues as her first issue on appeal, that the trial court erred by allowing the state to introduce a photograph showing the location of blood stains from the crime scene which was initially ruled to be too prejudicial.

The admissibility of photographs is governed by Tennessee Rules of Evidence 401 and 403. *See State v. Banks*, 564 S.W.2d 947, 949-951 (Tenn. 1978). The trial court must first determine whether the photograph is relevant to an issue that the jury must decide. Tenn. R. Evid. 401; *see also State v. Cole*, 155 S.W.3d 885, 912 (Tenn. 2005). The trial court must then apply Rule 403 of the Tennessee Rules of Evidence, which explains that even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” The Tennessee Supreme Court has explained:

Rule 403 is a rule of admissibility, and it places a heavy burden on the party seeking to exclude the evidence. Excluding relevant evidence under this rule is an extraordinary remedy that should be used sparingly and persons seeking to exclude otherwise admissible and relevant evidence have a significant burden of persuasion.

State v. James, 81 S.W.3d 751, 757-58 (Tenn. 2002) (internal quotations and citations omitted). With regard to the standard applied by the trial court to rulings on relevance and the admissibility of evidence, this court has stated:

Relevance is determined by the issues presented for resolution in the trial which, in turn, are determined by the elements of the offense charged and the defense asserted by the accused . . . The standard of review of admissibility of evidence under Tennessee Rules of Evidence 401 and 402 is abuse of discretion.

State v. David Boyd Conner, Jr., No. M2005-01628-CCA-R3-CD, 2006 WL 3516215 at *6 (Tenn. Crim. App. at Nashville, Dec. 5, 2006) *perm. app. denied* (Tenn. Apr. 23, 2007) (citing *State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997)).

It appears from the record that prior to commencement of the trial, the trial court refused to permit the state to introduce a particular photograph of the bedroom in which the attack on the victim was alleged to have occurred. The photograph depicted an area of the bedroom with a telephone, a rug over a carpet, and a portion of the door to the room covered or partially covered with blood. During the direct examination of Charlie Avinger, testimony was elicited about the blood-covered rug. Specifically, the following exchange was held:

Defense Counsel: Mr. Avinger, if I could direct you to the bottom of the screen. What is that there that's on the ground?

Mr. Avinger: That's - that's a rug.

Defense Counsel: Okay.

Mr. Avinger: That's my bed, a rug, a telephone.

Defense Counsel: Okay. I'm just talking about on the floor. What's on the ground?

Mr. Avinger: It looks like clothing with blood.

Defense Counsel: Okay. And then the rug underneath it; is that right?

Mr. Avinger: Yes.

Defense Counsel: Okay. What was that rug for? Why did you have that rug in the bedroom for?

Mr. Avinger: I had - we had brown spots in my room on the carpet, so I had that long rug right there to cover the brown spots.

Defense Counsel: Okay. Did you have spots and stains all over the carpet in that bedroom?

Mr. Avinger: Yes.

After Mr. Avinger's testimony, the state approached the court and asked that the photograph which had previously been ruled inadmissible be admitted to rebut Mr. Avinger's testimony on cross-examination. The trial court ruled in a jury-out hearing that the photograph was now admissible and that the defendant had opened the door to its admission by eliciting testimony from Mr. Avinger about the rug and carpet.

Upon review of the record, we conclude that the trial court did not err by permitting admission of the photograph it had previously ruled inadmissible. Admission of the photograph was within the discretion of the trial court. *See DuBose*, 954 S.W.2d at 652. In our view, the defendant clearly opened the door to the admission of the photograph during its direct examination of Mr. Avinger. The defendant's questioning of Mr. Avinger about the presence of pre-existing brown stains versus newer blood-stains on the rug and carpet raised the probative value of the photograph. *See Tenn. R. Evid.* 401; 403. Additionally, because the relevance of the rug was raised by the defendant within the scope of direct examination, the state was entitled to introduce the photograph to question or rebut any inference raised by the defendant on direct examination. *See Tenn. R. Evid.* 611.

We note that although the defendant protests the admission of the photograph in question, she does not address the trial court's reasoning for admitting the photograph or offer any countervailing argument as to why the defendant did not, in fact, "open the door" to its admission. Furthermore, after reviewing the photograph at issue, we are of the belief that the scene depicted in the photograph is not unfairly prejudicial. We agree with the state that even though the photograph shows blood on the rug and carpet, it is not gruesome or inflammatory. The probative value of the photograph is established because it corroborates the defendant's testimony that she bled profusely as a result of the knife attack. In addition, the jury was tasked with the question of determining the credibility of the victim and the defendant. The probative value of the photograph is further established to the extent it aids the jury in determining the credibility of the defendant's and the victim's conflicting testimonies. Accordingly, for the reasons stated above, we conclude that the trial court did not err in admitting the photograph and therefore the defendant is not entitled to relief on this issue.

B. Sufficiency of the Evidence

As her second issue on appeal, the defendant argues that the evidence was insufficient to sustain her conviction for attempted second-degree murder.

Upon review, we recognize the well-established rule that once a jury finds a defendant guilty, his or her presumption of innocence is removed and replaced with a presumption of guilt. *State v. Evans*, 838 S.W.2d 185, 191 (Tenn. 1992). Therefore, on appeal, the convicted defendant has the burden of demonstrating to the appellate court why the evidence will not support the jury's verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000); *State v. Tuggle*, 639 S.W.2d 913, 914 (Tenn. 1982). To meet this burden, the defendant must establish that no "rational trier of fact" could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); see *State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003); see also Tenn. R. App. P. 13(e). The jury's verdict, once approved by the trial judge, accredits the state's witnesses and resolves all conflicts in favor of the state. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). The state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which may be drawn from that evidence. *Carruthers*, 35 S.W.3d at 558. Questions concerning the credibility of the witnesses, conflicts in trial testimony, the weight and value given to the evidence, and all factual issues raised by the evidence are resolved by the trier of fact and not this court. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997). We do not attempt to re-weigh or re-evaluate the evidence. *State v. Reid*, 91 S.W.3d 247, 277 (Tenn. 2002).

Second degree murder is "[a] knowing killing of another." See Tenn. Code Ann. § 39-13-210(a)(1). A knowing act requires one to be "aware of the nature of the conduct" and "aware that the conduct is reasonably certain to cause the result." *Id.* § 39-11-302(b). "[A] result-of-conduct crime does not require as an element that an actor engaged in a specified course of conduct accomplish the specified result." *State v. Ducker*, 27 S.W.3d 889, 896 (Tenn. 2000). Criminal attempt is statutorily defined as follows:

(a) A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:

(1) Intentionally engages in action or causes a result that would constitute an offense, if the circumstances surrounding the conduct were as the person believes them to be;

(2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or

(3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

Tenn. Code Ann. § 39-12-101. Whether the defendant "knowingly" attempted to kill the victim is a question of fact for the jury. See *State v. Inlow*, 52 S.W.3d 101, 104-105 (Tenn. Crim. App. 2000). Intent may be inferred by the trier of fact from the character of the assault and from all the facts and circumstances surrounding the offense. See *Inlow*, 52 S.W.3d at 105 (quoting *State v. Holland*, 860 S.W.2d 53, 59 (Tenn. Crim. App. 1993)).

We conclude that the evidence was sufficient to support the defendant's conviction for attempted second-degree murder. The evidence established that the defendant was upset about the victim's relationship with the defendant's boyfriend. The defendant came to the house with evidence of the relationship to confront the victim. After confronting the victim, the defendant attacked her. The evidence supports an inference that the defendant armed herself with a deadly weapon, threatened to kill the victim and did, in fact, stab her repeatedly. It is apparent that the jury weighed the evidence, considered the facts and circumstances of the case, and declined to credit the defendant's testimony. Therefore, the defendant is not entitled to relief on this issue.

CONCLUSION

Based on the foregoing, we affirm the judgment of the trial court.

J.C. McLIN, JUDGE